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Re: Invitation to Voluntarily Comply with Shoshone-Bannock Tribes' TERO / Unilateral Administrative Order, June 20, 2013 / FMC Operable Unit

Gentlemen:

I invite you to consider voluntarily supporting compliance with the Shoshone-Bannock Tribes' (Tribes) Tribal Employment Rights Ordinance (TERO) in connection with the remedial work under the June 20, 2013 Unilateral Administrative Order (UAO) at the FMC Operable Unit. I also invite you to consult with the Tribes' TERO Director and Fort Hall Business Council regarding this issue.

As you know, the President of the United States has consistently mandated that Federal Agencies consult with tribal officials on issues that affect tribes.<sup>1</sup> The basis for the consultation mandate is the United States' well-established trust relationship with tribal governments. For well over a century the United States has recognized Indian tribes as domestic dependent nations with inherent sovereignty. Time and again Congress has enacted legislation affirming the trust obligation of the Federal Government. As sovereign nations, Indian tribes exercise inherent sovereign powers over their members and territory.

Recognizing its unique legal relationship and obligation to Indian tribes, the EPA developed a Policy on Consultation and Coordination with Tribes, dated May 4, 2011. This Policy cements the EPA's obligation to consult and coordinate with the Shoshone-Bannock

<sup>1</sup> Executive Memorandum re: Tribal Consultation (2009) (<http://www.epa.gov/tp/pdf/tribal-consultation-memorandum-09.pdf>); Executive Memorandum Government to Government Relationship with Tribal Governments (2004); Executive Order 13175 (2000); GSA Policy Toward to Native and Alaskan Tribes (ADM 1072.1)(1999).



Tribes about the application of TERO to the EPA's role in administering work under the UAO at the FMC OU.

In addition to the consultation and coordination obligation, the EPA has an express internal obligation to support TERO. The EPA Policy for the Administration of Environmental Programs on Indian Reservations, dated November 8, 1984, remains the cornerstone for the EPA's Indian Program. It declares applicable guiding principles, including:

3. *The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for Reservation lands;*
5. *The Agency, in keeping with the Federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect Reservation environments;*
8. *The Agency will strive to assure compliance with environmental statutes and regulations on Indian Reservations;*
9. *The Agency will incorporate these Indian policy goals into its[] management activities, including its budget, operating guidance, management accountability system and ongoing policy and regulation development processes.*

This means that the EPA has a legal obligation to consult with the Tribes and should carry out its administrative duties under the UAO in a manner consistent with its underlying trust responsibility to support compliance with TERO. Executive Order 12866, Section 1(b)(9) and Executive Order 13175, Section 2(a)-(b).

By way of background information, TERO was passed by the Tribe's Business Council in 1980. TERO has gone through several amendments and the most recent version of TERO was last amended in 2008, TERO 08-S1. The authority to pass an employment preference law is founded upon the inherent sovereign status that the Tribes enjoy. TERO requires that employers who are engaged in operating a business on the Reservation, give preference to qualified Indians in all aspects of employment, contracting, hiring, and other business activities. The primary purpose of TERO is to ensure that Tribal members and businesses gain their rightful share to employment, training, contracting, subcontracting, and business opportunities on the Reservation. As you may be aware, there is horrendous problem with poverty, alcoholism, drug abuse, economic dependency, and underemployment on most Reservations. Much of these same conditions exist on the Fort Hall Indian Reservation. TERO helps eliminates discriminatory and other barriers Tribal members face while searching for employment and business opportunities in an effort to cure some of these Reservation problems.

There are no federal laws which prohibit Indian Preference, even when applied to Federal Government agencies. *Morton v. Mancari*, 417 U.S. 535 (1974). A tribe may not have authority to force a federal government agency to comply with TERO. *Mayo v. United States*, 319 U.S. 441 (1945). However, there are many benefits that a Federal Government agency, such as the Environmental Protection Agency (EPA), can gain by voluntarily complying with TERO.

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Will you support compliance with the Tribes' TERO law by requiring Booz Allen Hamilton to comply with TERO?

Sincerely,

A handwritten signature in blue ink that reads "Mark Echo Hawk". The signature is fluid and cursive, with a period at the end.

Mark A. Echo Hawk  
Special Counsel

MAE/jtp

cc: TERO  
Business License Department  
Fort Hall Business Council  
William Bacon  
Cyndy Mackey

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## EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

### INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

### POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.



William D. Ruckelshaus